Office - Supreme Court, U.S.
FILED
SEP 11 1957
JOHN T. PEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 449

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*WILLIAM F. KENNEY,
OLIVER L. STONE,
50 West 50th Street,
New York 20, New York.

R. H. WHILDEN,
Shell Building,
Houston, Texas.

DAVID T. SEARLS,
VINSON, ELKINS, WEEMS & SEARLS,
Esperson Building,
Houston, Texas.

Attorneys for Petitioner.

* Attorneys upon whom service is to be made.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I—The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By This Court	8
II—The Judgment of the Court of Appeals Announces a Principle in Conflict With That Announced by the Supreme Court of Kansas in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 582, Which Case is On Appeal in This Court With Probable Jurisdiction Having Been Noted by This Court. No. 85, October Term, 1956	12
III—The Court of Appeals Has Decided a Federal Question in a Way in Conflict with Principles Announced in Decisions of This Court and Has Resolved the Issue Primarily on Considerations of Alleged Economic Necessity and Public Policy Which May Appropriately be Considered only by Congress	14
CONCLUSION	16
CERTIFICATE OF SERVICE	17

TABLE OF CASES.

	PAGE
Arkadelphia Mill. Co. v. *St. Louis S. W. R. Co.*, 249 U. S. 134	14
Cities Service Gas Co. v. *Peerless Oil and Gas Co.* (1950), 349 U. S. 179	12
Cities Service Gas Company v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 582; No. 85, Oct. Term, 1956	9
Coe v. *Errol* (1886), 116 U. S. 517	11, 14
Crescent Cotton Oil Company v. *Mississippi*, 291 U. S. 584	14
Empresa Siderurgica, S. A. v. *County of Merced* (1949), 337 U. S. 154	11
Federal Compress and Warehouse Company v. *McLean*, 291 U. S. 17	14
Federal Power Commission v. *East Ohio Gas Company*, 338 U. S. 464	15
Federal Power Commission v. *Panhandle Eastern Pipe Line Co.* (1949), 337 U. S. 498	12
Federal Trade Commission v. *Bunte Bros., Inc.* (1941), 312 U. S. 349	11, 16
Interstate Natural Gas Company v. *Federal Power Commission*, 331 U. S. 682	9
J. M. Huber Corp. v. *F. P. C.* (1956), 3 Cir., 236 F. 2d 550, cert. den. 352 U. S. 971	9
Michigan-Wisconsin Pipe Line Company v. *Calvert* (1954) 347 U. S. 157	8, 11, 14
Michigan-Wisconsin Pipe Line Company v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 908	13
Natural Gas Pipeline Company of America v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 44	9, 13
Oliver Mining Company v. *Lord* (1923), 262 U. S. 172	11

PAGE

Panhandle Eastern Pipe Line Company v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 908 13

Parker v. *Brown* (1943), 317 U. S. 341 ..... 11, 14

Phillips Petroleum Company v. *Wisconsin et al.*, 347 U. S. 672 ..... 8, 9, 10, 13

Saulsbury Oil Company v. *Phillips Petroleum Co.* (1944), 10 Cir., 142 F. 2d 27 (cert. den. 323 U. S. 727) 12

Utah Power & Light Company v. *Pfost* (1932), 286 U. S. 165 ..... 11, 12, 14, 15

United States v. *Yellow Cab Company* (1947), 332 U. S. 218 ..... 11, 14

STATUTES.

Natural Gas Act, 15 U. S. C. 717 r (b),

Sec. 1(b) 3, 8, 10

Sec. 19(b) 2

28 U. S. C. 1254(1) 2

Federal Power Commission Rules of Practice and Procedure,

Sec. 1.7(c) 3

TEXT.

H. R. Rep. No. 709, 75 Cong., 1st Sess. p. 1 11

Index to Appendix.

PAGE

Opinion in *Shell Oil Company* v. *Federal Power Commission* 18

Dissenting Opinion of Brown, C. J. 23

Opinion in *Deep South Oil Company of Texas* v. *Federal Power Commission* 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Shell Oil Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on June 29, 1957.

Opinions Below

The majority and dissenting opinions in the Court of Appeals have not been reported. The opinions appear in the appendix to this petition. There is also appended hereto a copy of the opinion of the Court of Appeals in *Deep South Oil Company of Texas* v. *Federal Power Commission.* The decision of the Presiding Examiner, opinion and order of the majority of the Federal Power Commission, and dissenting opinion of Commissioner Digby are contained in the record (R. 130, 340, 357).

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on June 29, 1957.

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Sec. 19(b) of the Natural Gas Act, 15 U. S. C. 717 r (b).

Questions Presented

1. Does the sale of casinghead gas by the producer to a gatherer and processing plant operator, who is not an interstate gas pipe line company, with delivery and passage of title at the lease separator prior to gathering and processing, constitute "the sale in interstate commerce of natural gas for resale for ultimate public consumption" so as to bring such sale within the Natural Gas Act and the jurisdiction of the Federal Power Commission?

2. Does the sale of casinghead gas and gas-well gas with delivery and passage of title at the lease separator and wellhead, respectively, by the producer to an interstate pipe line company prior to gathering and processing constitute "the sale in interstate commerce of natural gas for resale for ultimate public consumption" so as to bring such sale within the Natural Gas Act and the jurisdiction of the Federal Power Commission?

3. If the foregoing sales are "in interstate commerce of natural gas for resale", are they within the production and gathering exemption of Section 1(b) of the Natural Gas Act?

Statute Involved

The statute involved is the Natural Gas Act of 1938, as amended (52 Stat. 831; 15 U. S. C. 717-717 w, herein called the Act), and particularly Section 1(b) thereof, which provides (15 U. S. C. 717):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement of the Case

This case was instituted by Shell before the Federal Power Commission pursuant to Section 1.7(c) of the Rules of Practice and Procedure of the Commission for a declaratory order seeking a status determination under the Act of Shell's sale of casinghead gas to Phillips Petroleum Company with delivery and passage of title at the lease separator in the McElroy Field, Crane and Upton Counties, Texas.[1]

---

[1] Deep South Oil Company of Texas had previously filed a similar petition as to its sales in the North Big Hill Field, Jefferson County, Texas. Shell intervened in that proceeding before the Commission and sought a status determination as to its sale to Texas Gas Pipe Line Corporation of casinghead gas and gas-well gas in the Nome Field, Jefferson County, Texas, which field is in the vicinity of and is served by the same processing plant as the North Big Hill Field. The Shell and Deep South cases, together with a similar proceeding which had been instituted by Humble Oil & Refining Company, were consolidated for hearing before the Commission. These three proceedings were submitted to the Court of Appeals on a joint record and, together with a related case of Continental Oil Company, were argued at the same time before the Court of Appeals.

Phillips does not transport any of this gas outside of Texas. It gathers the casinghead gas to its processing plant located in the field about five miles from Shell's leases where the casinghead gas is processed[2] by Phillips for the manufacture of liquid products and residue gas. Some of this residue gas is sold by Phillips to El Paso Natural Gas Company, an interstate pipe line company which transports the residue out of Texas after El Paso dehydrates and treats the residue for the removal of hydrogen sulphide (App. below, Vol. One, pp. 26-28).[3]

Shell acquired its oil and gas leases in the McElroy Field in 1938, at which time the casinghead gas was subject to a casinghead gas contract which had been entered into on May 7, 1936 between Phillips and Shell's predecessor in title.

At the date of the casinghead gas contract, Phillips was not selling any of the residue gas from its Crane Gasoline Plant. This plant began operating in 1929 and the residue gas manufactured therein was flared into the air until July 1950 when Phillips entered into the contract with El Paso Natural Gas Company providing for the sale of a portion of the residue gas with delivery near the outlet of the plant (App. below, Vol. One, pp. 29, 81).

There are 19 oil wells on Shell's leases in the McElroy Field. The casinghead gas which Shell sells to Phillips is produced, along with the oil, from these wells. In the

---

[2] This processing, which is a term of art in the gas industry, is an intricate undertaking, not to be confused with mere compression and cleaning of the casinghead gas. It actually changes the character, utility and value of the casinghead gas (pp. 5-6, *infra*).

[3] From the record in the Court of Appeals, there is filed in this Court copies of the Appendix to the brief filed by Shell in the Court of Appeals. This Appendix is in two volumes; Volume One being testimony of certain witnesses and Volume Two consisting of certain exhibits which were introduced at the hearing. Reference herein to said Appendix will be to "App. below", followed by the volume number and the page or exhibit number.

reservoir, casinghead gas is in solution or associated with crude oil and is produced in solution with the oil (App. below, Vol. One, pp. 6, 40, 70).

The well effluent from Shell's wells flows at well pressure through small production flow lines to a separator which is located on one of Shell's leases a short distance from the wells. In the separator the crude oil and free water are separated from the casinghead gas, with the casinghead gas passing out of the top of the separator into a small vent line which connects with the terminus of a 4-inch lateral line of Phillips a few feet from the separator. At this point, which is still on Shell's lease, Phillips takes delivery, title and exclusive control of the casinghead gas (App. below, Vol. One, pp. 6-10, 18, 23-24, 81 and Vol. Two, Exhibit 1).

At the point of delivery the casinghead gas contains methane, ethane, high quantities of liquefiable hydrocarbons (natural gasoline, butane and propane), water vapor and a large amount of hydrogen sulphide. In this condition the casinghead gas is not suitable for public consumption as fuel nor is it fit for transportation in high pressure lines which are used for transporting gas in interstate commerce (App. below, Vol. One, pp. 8-9, 26-29, 76-79, 82, 87 and Vol. Two, Exhibit 3).

After the casinghead gas enters the 4-inch lateral line of Phillips, it flows at well or separator pressure a distance of 1,531 feet where it enters one of four main gathering lines which Phillips owns and operates in the field for the purpose of gathering casinghead gas to its gasoline plant. At the point where the casinghead gas purchased from Shell enters one of the main gathering lines, the line is 10 inches in diameter but it progressively increases in size between that point and the plant to 24 inches. Upon entering this main gathering line, the casinghead gas is com-

mingled with other casinghead gas from a great number of wells in the field owned by other producers, and moves at slightly decreasing pressure to the inlet of the gasoline plant (App. below, Vol. One, pp. 10, 14, 16, 23, 25, 29 and Vol. Two, Exhibits 1 and 11).

The Crane Gasoline Plant of Phillips is served by four 24-inch main field gathering lines which bring into the plant between 33,000,000 and 34,000,000 cubic feet of casinghead gas per day from 897 wells in the McElroy Field. Of this amount, only approximately 500,000 cubic feet a day come from the 19 Shell wells (App. below, Vol. One, pp. 23, 24, 29).

When the casinghead gas reaches the plant, it is first scrubbed to remove water and small amounts of crude oil. After being compressed to approximately 50 pounds pressure it enters absorbers wherein an absorption process takes place resulting in the manufacture of liquids and residue gas (App. below, Vol. One, pp. 24, 27, 74-77 and Vol. Two, Exhibit 5).

Part of the residue gas is sold by Phillips to El Paso with delivery near the outlet side of Phillips' plant, part thereof is used by Phillips as fuel in the plant, and part is returned to the leases for lease operations. El Paso treats the residue gas to remove hydrogen sulphide from it. After dehydration in the State of Texas, this residue enters one of El Paso's lines for transportation into other States (App. below, Vol. One, pp. 26-28).

After Shell delivers the casinghead gas to Phillips at the separator, Shell has no further control over it, nor any title to it. The contract under which Phillips sells the residue gas to El Paso was negotiated solely between those parties. Shell is not a party to that contract in any capacity and had nothing to do with its negotiation (App. below, Vol. One, pp. 10, 12, 24, 29).

The greater part of the money which Shell receives from Phillips for the casinghead gas is for liquids extracted from that gas (App. below, Vol. One, p. 12 and Vol. Two, Exhibit 4).

In the Nome Field, Jefferson County, Texas, Shell has eight oil wells from which casinghead gas is produced, and one gas well. All of this gas has been sold by Shell to Texas Gas Pipe Line Corporation under a contract which obligates the purchaser to construct a segment of gathering line from the points at which the gas will be delivered, to a junction with an existing gathering line which goes to the Winnie Processing Plant located in the Nome Field. The casinghead gas is delivered at field separators and the gas-well gas is delivered at the wellhead (App. below, Vol. One, pp. 40-41, 44 and Vol. Two, Exhibits 6, 8, 9).

After taking title and delivery at the points mentioned above, the purchaser gathers the gas, or causes it to be gathered, commingled with other gas, into the Winnie Plant where it is processed. Some of the residue gas from the Winnie Plant (which still must be dehydrated) is delivered by the plant operator for interstate shipment and some is delivered for local use in Texas (App. below, Vol. One, pp. 46-47 and Vol. Two, Exhibit 6).

The processing which this gas undergoes in the Winnie Plant is similar to the processing which the casinghead gas from the McElroy Field undergoes in Phillips' Crane Gasoline Plant.

The Commission, with Commissioner Digby dissenting as to Shell's sale to Phillips in the McElroy Field, held these sales to be covered by the Act and subject to its jurisdiction thereunder. On review pursuant to Section 19(b) of the Act (15 U. S. C. 717 r (b)), the Court of Appeals, with one judge dissenting, affirmed the Order of the Commission.

Reasons for Granting the Writ

I

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Which Should Be, Settled By This Court.

The far-reaching effect of the decision of the Federal Power Commission and the Court of Appeals in this case is obvious. The result of these holdings is that sales of natural gas made in the course of production and prior to gathering and processing are sales in interstate commerce. This renders unconstitutional the production and gathering taxes on natural gas imposed by the States and jeopardizes the traditional rights exercised by the States in regulating the production and gathering of natural gas. *Michigan-Wisconsin Pipe Line Company* v. *Calvert* (1954), 347 U. S. 157.[4]

We contend that the sales under consideration are not covered by the Act and that this Court's decision in *Phillips Petroleum Company* v. *Wisconsin et al.*, 347 U. S. 672, did not settle the issues involved here. The *Phillips* decision did not judicially amend the Act to change its limited jurisdictional coverage of "sale in interstate commerce" into broader coverage of "sale affecting interstate commerce".

The sole issue in that case was whether the production and gathering exemption of Section 1(b) of the Act removed from Commission jurisdiction sales of gas into the flow of interstate commerce after the completion of gathering and

---

[4] The Attorney General of the State of Texas filed an *amicus curiae* brief with the Court of Appeals seeking to have the Order of the Commission reversed on the ground that such order interfered with the traditional powers of the States to regulate the production and gathering of gas, including the power of the States to levy production and gathering taxes thereon.

processing. That is not the issue in this case. The sales involved in the *Phillips* case were consummated after production, gathering and processing were completed and were admitted to be in interstate commerce. 347 U. S. at 677. Thus, the jurisdictional questions involved in this case have not been settled by this Court.[5] But they are of such vital importance to an industry fraught with uncertainty as to the jurisdictional status of pre-gathering and pre-processing sales of gas, that we respectfully submit they should be set at rest by this Court.

This Court has recognized the importance of issues closely related to those in the instant case by having noted probable jurisdiction in the appeal to this Court from the Supreme Court of Kansas in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 582; No. 85, Oct. Term, 1956.

The Commission's series of 174 Orders (Fed. Reg., Vol. 19, No. 1, Page 4534, published July 22, 1954; No. 156, Page 5081, published August 12, 1954; and No. 243, Page 8807, published December 23, 1954) does not remove but adds to the uncertainty concerning the Commission's jurisdiction over pre-gathering, pre-processing sales. Those orders apply to "sales in interstate commerce" which are "subject to jurisdiction of the Commission", without in any wise attempting to determine administratively whether sales prior to gathering and processing to a non-interstate pipe line company constitute sales in interstate commerce for

---

[5] *J. M. Huber Corp.* v. *F. P. C.* (1956), 3 Cir., 236 F. 2d 550, cert. den. 352 U. S. 971, does not settle this question. There the sale did not involve casinghead gas sold before gathering and processing to a non-interstate pipe line company, but involved the abandonment of facilities used in connection with a sale of gas directly into the line of an interstate pipe line company. Likewise, *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, and *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U. S. 44, furnish no guide here, as each involved sales of gas after production and gathering had ended.

resale, and if so, whether such sales are within the production and gathering exemption of Section 1(b) of the Act.

It was in the light of this uncertainty that Shell instituted this proceeding for declaratory order in accordance with the Commission's Rules for the purpose of having this question resolved by this Court. Divided opinions by the Commission and by the Court of Appeals attest to the closeness of the question and emphasize the need of this Court setting this question at rest. This case, to which the Commission is a party, presents an adequate record for resolving this important jurisdictional question under the Act.

The Court of Appeals concluded that the sales here involved are subject to the Act and to the Commission's jurisdiction thereunder because such sales are in interstate commerce. The gas was said to be moving in interstate commerce at the time when and place where Shell's sales were consummated. This conclusion was reached despite the fact that after the casinghead gas is sold by Shell to Phillips it is then gathered to a field processing plant where it undergoes a manufacturing process resulting in liquid products and residue gas, and it is only this residue gas which Phillips thereafter sells and delivers to an interstate pipe line company. The conclusion, we submit, fails to distinguish between "movement of molecules" and "interstate commerce".

It is our contention, and we so urged before the Commission and the Court of Appeals, that this Court's opinion in *Phillips Petroleum Company* v. *Wisconsin, supra,* does not control this case; that the decision in that case, which emphasized that the sales of residue gas were made after gathering and processing had been completed with delivery and passage of title at the outlet of processing plants directly into the stream of interstate commerce, marked

the limit on the producing and gathering end to which the coverage of the Act and the jurisdiction of the Commission could be extended. It is our position that Shell's sales are not covered by the Act because:

1. The Natural Gas Act is an "in" commerce statute, not an "affecting" commerce statute, and applies only to sales completed by delivery after production, gathering and processing have been completed. *Federal Trade Commission* v. *Bunte Bros., Inc.* (1941), 312 U. S. 349.

2. Shell's sales are not "in interstate commerce", and hence not covered by the Act, because:

(i) These sales are completed prior to gathering and processing, and the interstate journey does not begin until after these preliminary functions are completed. *Coe* v. *Errol* (1886), 116 U. S. 517; *Oliver Mining Company* v. *Lord* (1923), 262 U. S. 172; *Utah Power & Light Company* v. *Pfost* (1932), 286 U. S. 165; *Parker* v. *Brown* (1943), 317 U. S. 341; *United States* v. *Yellow Cab Company* (1947), 332 U. S. 218; *Empresa Siderurgica, S. A.* v. *County of Merced* (1949), 337 U. S. 154; *Michigan-Wisconsin Pipe Line Company* v. *Calvert* (1954), 347 U. S. 157.

(ii) There is no continuous and uninterrupted movement of the gas in interstate commerce from the separators and wellheads across state lines—the interstate movement succeeds to gathering and processing, it is not a part of these functions. Cases, *supra*, 2(i).

(iii) Extension of the Act to sales of gas prior to gathering and processing will jeopardize the power of the States to regulate and tax these local activities and to administer effectively their conservation laws, thus defeating the purpose of the Act which was to complement, not to supersede, State power. *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, *supra*; H. R. Rep. No. 709, 75th Cong., 1st Sess. p. 1.

3. Shell's sale to Phillips of casinghead gas in the McElroy Field is not for "resale" but is for manufacturing purposes (App. below, Vol. Two, Exhibit 2, par. 1).

4. The casinghead gas which is sold by Shell to Phillips is not the same product as the residue gas which is later sold by Phillips to El Paso. The casinghead gas itself is not suitable for public consumption or interstate transmission in high-pressure interstate trunk lines at the time of sale. The residue gas which is sold by Phillips to El Paso is a mere by-product of the casinghead gas. *Utah Power & Light Co.* v. *Pfost, supra; Saulsbury Oil Company* v. *Phillips Petroleum Co.* (1944), 10 Cir., 142 F. 2d 27 (cert. den. 323 U. S. 727).

5. The sales involved in this case are within the production and gathering exemption of Section 1(b) of the Act. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.* (1949), 337 U. S. 498; *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.* (1950), 349 U. S. 179.

II

The Judgment of the Court of Appeals Announces a Principle in Conflict With That Announced by the Supreme Court of Kansas in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 180 Kan. 454, 304 P. 2d 582, Which Case is on Appeal in This Court With Probable Jurisdiction Having Been Noted by This Court. No. 85, October Term, 1956.

The substantive issue involved in the *Cities Service Gas Company* appeal is whether the State of Kansas through its Corporation Commission has the power, despite the Natural Gas Act and the jurisdiction of the Federal Power

Commission thereunder, to fix the wellhead price of gas as a condition to its production where the gas is sold in Kansas for transportation and resale outside of Kansas.[6]

Since wellhead sales prior to gathering and processing are involved in that case, an affirmance by this Court of the judgment of the Supreme Court of Kansas will cause the judgment entered in this case by the Court of Appeals to be in conflict with such decision by this Court. For if Kansas, as a condition to the production of gas, can validly establish the price which must be attributed at the wellhead to gas which ultimately leaves that State, so can Texas with respect to the casinghead gas involved in this case. But since the Court of Appeals in this case has held that Shell's sales are subject to the exclusive jurisdiction of the Federal Power Commission, there would result a direct conflict between the federal and state agencies involved.

---

[6] In *Phillips Petroleum Company* v. *The Corporation Commission of the State of Oklahoma et al.* (3 cases), Nos. 111-113, October Term, 1956, on the Docket of this Court, Phillips has filed an appeal from Orders on Mandate entered by the Supreme Court of Oklahoma on Mandates issued by this Court in No. 320, October Term, 1954, *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 44; No. 321, October Term, 1954, *Michigan-Wisconsin Pipe Line Company* v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 908; and No. 322, October Term, 1954, *Panhandle Eastern Pipe Line Company* v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 908. The said Orders entered by the Supreme Court of Oklahoma set aside Minimum Price Order No. 26,096 of the Oklahoma Corporation Commission, which was at issue before this Court in Causes Nos. 320, 321 and 322, to the extent only that said Order No. 26,096 fixes a minimum price for sales of *residue* gas under existing contracts to an interstate pipe line company. One of the questions presented by the appellant in Nos. 111-113 is whether, by reason of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder, the Oklahoma Commission Minimum Price Order, as modified by the Orders of the Supreme Court of Oklahoma, is valid insofar as it attempts to fix the minimum price at the wellhead of natural gas purchased by Phillips at the wellhead for sale in interstate commerce for resale.

No matter what approach is taken to the problem, the price at which an independent producer such as Shell sells its gas to a gatherer and processing plant operator who is not an interstate pipe line company, should be subject to regulation by not more than one governmental agency. This Court alone can determine with finality which of the agencies has that power.

III

The Court of Appeals Has Decided a Federal Question in a Way in Conflict with Principles Announced in Decisions of This Court and Has Resolved the Issue Primarily on Considerations of Alleged Economic Necessity and Public Policy Which May Appropriately be Considered only by Congress.

In concluding that Shell's sales were in interstate commerce, the Court of Appeals disregarded the principle established in *Coe* v. *Errol*, 116 U. S. 517, decided in 1886, and applied through the years to and including *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, decided in 1954. See: *Parker* v. *Brown*, 317 U. S. 341; *Crescent Cotton Oil Company* v. *Mississippi*, 291 U. S. 584; *Federal Compress and Warehouse Company* v. *McLean*, 291 U. S. 17; *United States* v. *Yellow Cab Company*, 332 U. S. 218; *Arkadelphia Mill. Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134; and *Utah Power and Light Company* v. *Pfost*, 286 U. S. 165.

In the *Calvert* case this Court recognized that when gas is sold and delivered at the outlet of a processing plant to an interstate pipe line company, such gas *begins* its interstate journey or has its "*taking off*" into commerce upon delivery into the interstate line. In that case this Court,

in distinguishing the *Pfost* case, drew the following analogy which fits perfectly into the instant case. There this Court, in Footnote 6, said:

> "This court (referring to the Pfost case) found that in the operation there involved it was necessary to convert the mechanical energy into electrical energy before it could be transmitted and that this transformation was completed at the generator *where the interstate movement began.* This is analogous to the situation here where the gas is prepared by Phillips for transmission and is then conveyed into appellant's lines." (Emphasis supplied.)

The Court of Appeals concludes that there was movement of the gas at the time it was sold by Shell to Phillips, hence interstate commerce had commenced at that point. This reasoning confuses movement with interstate commerce and overlooks the principle recognized by this Court in *Federal Power Commission* v. *East Ohio Gas Company*, 338 U. S. 464, that at the destination end of the interstate movement of gas, interstate commerce ceases and intrastate commerce begins when the gas passes from the high-pressure trunk lines into the local mains. The converse of this principle is that, at the origin end of the movement, gas does not leave the area of state regulation (intrastate commerce) until it passes out of the local production and gathering lines, is processed, and then enters into the current of the interstate pipe line.

The Court of Appeals feels that consumer protection requires federal regulation from reservoir to burner-tip. This disregards the countervailing economic argument that competition in the producing field, rather than federal regulation at that point, affords more and longer lasting protection to consumers. It also constitutes judicial enlargement, upon debatable economic considerations, of the extent

to which Congress regulated the gas industry when it enacted the Natural Gas Act.

The decisions of this Court holding that under the "commerce clause" the federal government can reach local activities which affect interstate commerce, have no application here. The Natural Gas Act applies to sales "in interstate commerce" and not those "affecting interstate commerce". This Court has recognized this distinction in *Federal Trade Commission* v. *Bunte Brothers, Inc., supra.*

Conclusion

For the foregoing reasons Shell Oil Company prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM F. KENNEY,
OLIVER L. STONE,
50 West 50th Street,
New York 20, New York.

R. H. WHILDEN,
Shell Building,
Houston, Texas.

DAVID T. SEARLS,
VINSON, ELKINS, WEEMS & SEARLS,
Esperson Building,
Houston, Texas.

Attorneys for Petitioners.

By WILLIAM F. KENNEY
WILLIAM F. KENNEY

New York, New York: September 10, 1957.

Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 10th day of September, 1957:

J. Lee Rankin, Solicitor General
Department of Justice
Washington 25, D. C.

Willard W. Gatchell, General Counsel
Robert L. Russell, Attorney
William L. Ellis, Attorney
Federal Power Commission
441 G Street, N.W.
Washington 25, D. C.

William F. Kenney
Attorney for Petitioner

New York, New York
September 10, 1957

APPENDIX.

Opinion in *Shell Oil Company* v. *Federal Power Commission.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15900

SHELL OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Power Commission, sitting at Washington, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is a companion case to *Deep South Oil Company of Texas* v. *Federal Power Commission*, No. 15,849, this day decided, in that Shell Oil Company, pursuant to Section 19(b) of the Natural Gas Act, is seeking review of the order of the Federal Power Commission which is the subject also of review in the *Deep South* case.

While the facts in the instant case are similar to those presented in *Deep South*, they are not identical thereto, and for present purposes they may be summarized as follows:

Petitioner herein, Shell Oil Company, is engaged in the business of exploring for, producing, refining and marketing petroleum and petroleum products, and with respect to its Texas operations, it produces and sells "casinghead gas" at or near the wellhead from nineteen oil wells in the McElroy Field and eight oil wells in the Nome Filed. It also sells "gas well gas" from one well in the latter field.

The casinghead gas which is produced in the McElroy Field is sold to Phillips Petroleum Company pursuant to a contract entered into between Phillips and petitioner's assignor on May 7, 1936. The contract provides, among other things, that Phillips shall pay to the seller fifty percent of the net proceeds received from any sale of the gas which it sells from the gasoline plant. Prior to delivery under the contract the gas from each of the nineteen wells located in this field passes through the wellhead and into a flow line which is connected with a single central field separator (located on Shell's lease) where the gas is separated from crude oil and free water. Within a few feet from the point at which the gas leaves this separator it is metered and delivered and title thereto passes to Phillips. As in *Deep South*, the gas sold by petitioner is commingled in the purchaser's field pipelines with casinghead gas from a number of other wells in the field and the commingled mass of gas thereafter enters Phillips' Crane gasoline plant where it is scrubbed, compressed, and run through absorption towers for the removal of liquefiable hydrocarbons. The greater part of the gas is thereafter sold by Phillips at the tailgate of the Crane plant to El Paso Natural Gas Company. Inasmuch as this gas contains too high a percentage of hydrogen sulphide and carbon dioxide for use as a domestic burner tip fuel, El Paso further treats the gas which it purchases to remove these incombustible diluents, dehydrates the gas, and then turns it into one of its transmission lines for transportation in other States.

All of Shell's gas, both casinghead and gas well gas, which is produced in the Nome Field is sold to Texas Gas Pipeline Corporation, a subsidiary of Texas Gas Corporation, pursuant to a contract entered into on October 15, 1954. As in the contract between Deep South and Texas Gas, the contract for the sale of Shell's gas from the Nome Field similarly commits to the performance thereof all of the gas to be produced from Shell's leases in that field and provides that the gas is to be delivered in a full stream without the extraction of gasoline or other hydrocarbons. Likewise, as in the case of *Deep South*, the purchaser receives delivery of the casinghead gas at the outlet valve of field separators and the gas well gas is delivered at the wellhead. After taking title and delivery at these points, the purchaser then commingles the gas in its field pipelines with gas purchased from many other sources and transports the commingled mass to the Winnie processing plant which is owned and operated by its parent corporation. At the Winnie plant the gas is processed for the removal of water vapor and liquefiable hydrocarbons and thereafter Texas Gas Pipeline Corporation receives for interstate shipment a portion of the processed gas.

As we noted in the *Deep South* opinion, the proceedings in this cause as well as in Cases Nos. 15,849 and 15,884, were consolidated before the Commission for hearing and in both the presiding examiner's decision and the Commission's Opinion No. 284, it was determined that all sales of natural gas by Deep South, Shell, and Humble Oil, there under consideration, were sales of natural gas in interstate commerce for resale within the meaning of the Natural Gas Act and that each of the petitioners was a "natural-gas company" subject to the Commission's jurisdiction.

In this review proceeding, the basic contentions and the grounds asserted for setting aside the Commission's order are in essence identical to those urged by petitioner in the

Deep South case, *supra*, and what we have said in that case is dispositive of those issues. However, and in view of petitioner's vigorous assertion that its sales to Phillips of casinghead gas which must be processed by both its purchaser and the subsequent buyer, El Paso, are not for "resale" but for "manufacture," we shall set forth in this opinion our reasons for rejecting this argument.

Petitioner relies strongly on the "purpose" clause of its contract with Phillips which provides that the casinghead gas sold thereunder is conveyed to the buyer for the purpose of manufacturing gasoline or such other products as may be manufactured at the Crane plant. It should not be overlooked, however, that this contract contains no limitation on the authority of Phillips to dispose of the gas in any way it sees fit, and affirmatively provides that the buyer shall have the right to sell any or all surplus gas remaining after the "extraction" of gasoline and also provides for the payment to petitioner of fifty percent of the receipts from such sales. Thus, the true purpose of the contract includes the sale of the gas which remains after processing as well as the sale of extracted products. But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture," but upon the actual disposition of the gas. The record here clearly shows that the gas sold to Phillips is resold by it and that the parties contemplated that the buyer would resell the gas in wholesale quantities is revealed in Section 3.02 of the contract which reads: "Buyer has applied to the Federal Power Commission for a Certificate of Public Convenience and Necessity *in order to establish a market for the gas committed hereto and to perform its obligations to seller under this contract. . . .*" (Emphasis supplied.) Thus, as in *Deep South*, there can be no question that petitioner is making sales in interstate commerce of natural gas for resale within the meaning of the Act.

Accordingly, the order of the Commission must be and the same hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to be filed.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

[SEAL]

Dissenting Opinion of Brown, C. J.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15849

DEEP SOUTH OIL COMPANY OF TEXAS,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15900

SHELL OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15884

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 16130

CONTINENTAL OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petitions for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(July 30, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting: Again, my differences, while substantial are basic and, in this approach, as before, *Magnolia Petroleum Co.* v. *Federal Power Commission*, 5 Cir., 236 F. 2d 785 at 793 to 811, I accept the Court's fair and faithful outline of the cases. Since these cases[1] present the common problem of jurisdiction of the Federal Power Commission over the first sale by an oil-gas-well producer made before production or gathering has ended, I treat them together despite minor variations in factual details.

Likewise, it both simplifies and emphasizes the nature of this problem to concentrate primarily upon the most

[1] In 16,130, *Continental Oil Company* v. *Federal Power Commission*, 5 Cir., . . . F. 2d . . . [June 29, 1957], procedural problems arise and are discussed. I am in agreement with the Court's disposition of these, and my differences as to that case relate solely to the basic issue.

common transaction[2]—the sale of casinghead gas to a processor who in turn sells residue gas to an interstate pipe line.

In this way we come to see what might otherwise be obscured. The problem really is: What did Congress in 1938 mean by the language of Section 1(b).[3] I purposefully emphasize 1938. For the circumstances of the passage of the Natural Gas Act were so unique that, we are told, "• • • *prior* constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508, 86 L. Ed. 371, 377 • • •; and see *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250, 86 L. Ed. 184, 191 • • •," *Federal Power Commission* v. *East Ohio Gas Company*, 388 U. S. 464, 472, 94 L. Ed. 268, 277.

This refers, of course, to the oft repeated history that Congress legislated to fill the gap created by specific decisions[4] of the Supreme Court. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 517-519, 92 L. Ed. 128, 137-139.

---

[2] Deep South to Texas Gas to Texas Eastern.
Shell to Texas Gas Pipeline to Transcontinental.
Shell to Phillips to El Paso Natural Gas.
Humble to Processors to Pipe Line Companies.

[3] §1(b), 15 USCA 717(b):

"The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption • • • and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas • • • or to the production or gathering of natural gas • • •."

[4] *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 310, 68 L. Ed. 1027, 1031; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 89, 71 L. Ed. 549, 553; and see *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434, subsequently repudiated *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 73 L. Ed. 1171.

This has at least a dual significance. First, it makes terribly important just what those cases decided, because it was the decisions which created the gap. And second, as 1938 Congressional preoccupation with the gap is the test, the jurisdictional parts of the Act must be viewed through 1938 lenses. With that outlook, can it be said that Congress knowingly set in train the consequences which flow from these decisions?

The first becomes of some importance in the Court's view because, in the final analysis, the conclusion reached in *Deep South* rests upon a Committee report[5] and the decision of *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 98 L. Ed. 1035. The fact is, of course, that neither of the two cases, note 4, *supra*, dealt even remotely with the sale by a producer in an oil field to a processor who in turn sold to an interstate pipe line. In *Attleboro* the utility generated and transported electricity; in *Kansas* the seller to the local distributing company was an integrated producer-transmission pipe line company. So far as *Phillips Petroleum Company* v. *Wisconsin, supra,* which I accept, is concerned, I hardly think that, with the Court's studied traditional refusal to deliver advisory opinions even on matters which it knows are then somewhere in the judicial mill and which will inevitably come through its own grist, the Supreme Court meant to decide that *all* sales of gas which, because of molecular identity, flow ultimately from Texas or Louisiana to New York are sales in interstate commerce.

This is but another way of saying that we face an entirely new case—one never before decided. The crucial

---

[5] The *Deep South* opinion states: "The Committee reports on the bill which became the Natural Gas Act specifically stated that 'sales for resale, or so-called wholesale sales in interstate commerce (for example, sales by producing companies to distributing companies) * * * have been considered [by the courts] to be not local in character, and even in the absence of Congressional action not subject to State regulation.'" H. R. Rep. No. 709, 75th Cong., 1st Sess. 1-2; Senate Rep. No. 1162, 75th Cong., 1st Sess. 1-2.

issue here is whether the sales are in interstate commerce as meant by §1(b). At the outset in *Phillips* that issue was conceded as "Petitioners admit that Phillips engages in 'the sale in interstate commerce of natural gas for resale,' as, of course, they must. *Interstate Natural Gas Co. v. Federal Power Com.*, 331 U. S. 682, 687-689, 91 L. Ed. 1742, 1746-1748," 347 U. S. 672 at 677, 98 L. Ed. 1035 at 1045. The second issue involved here is whether these sales are made in the course of production or gathering. The similar contention in *Phillips* fell by the Court's rejecting the Commission's finding and the plain holding that "We are of the opinion * * * that the finding is without adequate basis in law, and that production and gathering, in the sense that those terms are used in §1(b), end before the sales by Phillips occur," 347 U. S. 672, 678, 98 L. Ed. 1035, 1045. And certainly *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, 91 L. Ed. 1742, so heavily relied on in *Phillips* cannot have remotely decided our case. To Interstate's contention "that the sales to the three pipe line companies are a part of the gathering process and consequently not within the Commission's power of regulation," the court answered positively "By the time the sales are consummated, nothing further in the gathering process remains to be done," 331 U. S. 682 at 692, 91 L. Ed. 1742 at 1749. This case recognizes also that principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification. Concerning the Congressional purpose to leave production and gathering to the States, the Court stated:

> "It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation

> by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory function, the jurisdiction of the Federal Power Commission does not attach * * *," 331 U. S. 682 at 690, 91 L. Ed. 1742 at 1748.

So nothing written so far tells us authoritatively what Congress in 1938 meant to do about sales made prior to completion of production and gathering. Did Congress intend to place this under the control of a remote Federal bureau?

I think the consequences of any such holding are so far-flung and so disturbing to the delicate balance in our system of dual sovereignty that, divining the legislative will as is the judicial function, *United States* v. *American Trucking Associations,* 310 U. S. 534, 543, 84 L. Ed. 1345, 1350, and whether we look at this through 1938 lenses or 1957 bifocals, I cannot believe that Congress in this innocuous way thought that it was remaking the concept of our political economy.

Since it is the fact of *movement*[6]—continuous and almost irrepressible movement—from the time the gas molecule first begins to stir and is once released from the bowels of the earth until consumed at the Brooklyn burner tip—that is the characteristic which to the Court makes this inevitably interstate, the impact has been dramatically described, *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259-260, 67 L. Ed. 237, 243:

> "The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate com-

---

[6] The Court's decision of "sale in interstate commerce" is a bootstrap conclusion: it is an interstate sale because of the movement and yet the movement occurs only because of the sale.

> merce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

Such a holding withdraws from the states a traditional field for effective regulation of an economic activity of major importance to the general welfare of the state. Specifically, such a holding will forbid state regulation of oil and gas production activities insofar as that state policy is aimed at, or works through, the use of minimum prices.

This is no theoretical academic possibility. This is an actual fact of a present doctrine whose applicability is limited only by the ultimate judicial declaration of the earth-ward limits of a jurisdictional sale. As a part of the yet unascertained fallout of the atomic *Phillips* decision, the Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation* and *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma*, 349 U. S. 44, 99 L. Ed. 866, held that as to sales within the jurisdictional limits of *Phillips*, the State of Oklahoma was forbidden to apply its otherwise con-

stitutional[7] power to prescribe minimum prices for Oklahoma gas sold or delivered. The Court with brief but awesome finality said:

> "In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in Phillips Petroleum Company *v.* Wisconsin, 347 U. S. 672, 98 L. Ed. 1035 * * * that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one." 349 U. S. 44 at 44-45, 99 L. Ed. 866 at 867.

For these purposes it is of slight comfort to these states that, as *Panoma* plainly said, this was applied to a post-production and gathering sale. For the basis for the decision was the jurisdictional application of the Act. With the inexorable physical characteristic that traces molecules from Permian Basin to Queenstown Heights and joins body, fleece and tail to Mary's ubiquitous fabled lamb, wherever goes F. P. C. jurisdiction, so goes *Panoma*. There it was *after* gathering. Here it is at the wellhead before gathering is completed. The majority's decision takes us that far. Where can the states go? To the wellside of the Christmas tree? To the bottom of the well?

Wherever it is fixed is not far enough, nor may it ever be. For the thesis of the majority's opinion is to mix

---

[7] Apart from the effect of the Natural Gas Act, the predecessor of this very same state order (identical except as to the price) was upheld in *Cities Service Gas Company* v. *Peerless Oil & Gas Company*, 340 U. S. 179, 95 L. Ed. 190, and *Phillips Petroleum Company* v. *State of Oklahoma*, 340 U. S. 190, 95 L. Ed. 204. As to these, the Court in Panoma said, "In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act * * *," 349 U. S. 44 at 45, 99 L. Ed. 866 at 867.

Boyles and *Phillips* law to come up with the startling legal-statutory interpretation law that because gas, once released is in a constant state of movement, that *movement,* from the very moment it first started, is characterized (intra or interstate) by its final destination. This means that if Oklahoma prescribes the price, as has Kansas[8], as a condition precedent to the right of *withdrawal* of this valuable domestic resource, the sale of that gas *out* of the well—by which alone would there ever be production at all—was of necessity *in interstate commerce,* and such sale, and the movement of the gas occasioned by it would fall under *Panoma.*

Of course, I am not saying that this consequence makes the law invalid or unwise. I assume that Congress could within the broad compass of its constitutional powers over commerce do this very thing. But the fact, so often repeated is that "the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limits of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in §1(b) of the Act not only prescribed the intended reach of the Commission's power, but also specified the areas into which this power was not to extend," *Federal Power Commission* v. *Panhandle East-*

[8] Now pending before the Supreme Court with probably jurisdiction noted, 25 Law Week 3351, as No. 797, is the action of the Supreme Court of Kansas, *Cities Service Gas Company* v. *State Corporation Commission of Kansas,* 180 Kan. 454, 304 Pac. 2d 528, sustaining the action of the state regulatory agency in fixing the wellhead price for withdrawal of gas. Also pending are similar Oklahoma minimum price cases, see *Phillips Petroleum Company* v. *Oklahoma Corporation Commission,* Nos. 953-955, 25 L. W. 3346; *Michigan Wisconsin Pipe Line Company* v. *Corporation Commission of State of Oklahoma,* No. 809, 25 Law Week 3271.

ern Pipe Line Co., 337 U. S. 498 at 502-503, 93 L. Ed. 1449 at 1504.

Avowedly using only a portion of its power, is it likely then that Congress meant to go this far? To think so is to attribute to them a collective ignorance of an already well-defined traditional policy in the states to regulate[9], by regulating the price at which oil or gas could be sold, this important business. Indeed, so well recognized was such state policy that, in the setting of those days, it led to the passage of the Connally Hot Oil Act,[10] 15 USCA 715 et seq. This Act gears interstate transportation of oil to state regulation. And at least everyone on the outside of a courtroom knows that modern oil-gas conservation programs, preventing waste by limiting production to meet an established market demand,[11] whether they do so directly

---

[9] As shown by both pre and post-1938 decisions, these state efforts had met with Federal constitutional approval: *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062 (1932); *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 84 L. Ed. 1368 (1940); and see, *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940 (1934).

[10] The Act had its origin in the Executive Orders promulgated July 11, 1933 and July 14, 1933, under the National Industrial Recovery Act, 48 Stat. 200, chap. 90, 15 USCA 710(a), and stricken down in the celebrated case of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446; see *United States* v. *Gilliland*, 312 U. S. 86, 94, 85 L. Ed. 598, 604. "The purpose of the Connally Act • • • is to aid the states in enforcing laws limiting the amount of oil permitted to be produced from wells in designated fields, by prohibiting shipment of excess oil produced • • • in interstate commerce • • •." *The President of the United States* v. *Skeen*, 5 Cir., 118 F. 2d 58, 59.

[11] That this takes collective action of the interested oil-gas producing states is reflected by Congressional approval of the creation and activities of the Interstate Oil and Gas Compact, see Interstate Compact to Conserve Oil and Gas, Aug. 27, 1935, c. 781, 49 Stat. 939, Extensions Aug. 10, 1937, c. 572, 50 Stat. 617; July 20, 1939, c. 337, 53 Stat. 1071; August 21, 1941, c. 400, 55 Stat. 666; July 7, 1943, c. 494, 57 Stat. 383; Interstate Oil and Gas Compact Joint Resolution, Aug. 28, 1951, c. 350, 65 Stat. 199.

or indirectly, actually fix prices. And there need be no apology for this. For the welfare of a state whose economy rests substantially on oil and gas has a vital interest in local legislative or governmental means of stabilizing such a business. "That a legitimate local interest is at stake • • • is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources," *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 at 187, 95 L. Ed. 190 at 202.

Ten cent oil in the early thirties produced, in East Texas as elsewhere, calamity.[12] With this history so fresh in its recollection, indeed, with like contemporary problems so much then a matter for its current consideration, it is beyond my belief to think that Congress thought that, by the innocuous language of §1(b), it was letting loose a nascent force which either could, or would, or might completely alter a major business or thwart a major field of state regulation.

Chief Justice Vinson, recognizing in *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682 at 690, 91 L. Ed. 1742, 1748, *supra*, that some sales "technically consummated in interstate commerce • • • are so closely connected with • • • local incidents • • • as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory function, [and] the jurisdiction of the Federal Power Commission does not attach," showed great prescience.

Especially so, if, for example, the current holding and contention of the Federal Power Commission is followed[13] that the price for which independent producers may sell

---

[12] It led to what the Governor of Texas considered insurrection requiring declaration of martial law as recently enacted conservation laws were enjoined by Federal Courts. *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375.

[13] We now have nine such cases pending on petition for review from the Federal Power Commission.

their gas to a pipe line is controlled by *City of Detroit* v. *Federal Power Commission*, D. C. Cir., 230 F. 2d 810, cert. den. 352 U. S. 829, 1 L. Ed. 2d 48. That case, with its emphasis on cost data as a part of a so-called rate base, points out that if a "fair-field" price is to be justified, it can be so only when it does not produce more than reasonably necessary to permit continued exploration for and development of gas reserves. That, in the light of the oft-repeated statement that "Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act," *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, 685, 98 L. Ed. 1035 at 1049, may mean that it is the positive duty of the Federal Power Commission aggressively to demand and then approve only the *lowest* rate. But the rate which is most favorable to consumers in Brooklyn, *i.e.*, the *lowest* possible one, may run counter to, and could frustrate altogether, the domestic policy of Oklahoma,[14] or Kansas, or Texas, or New Mexico.

Again, I repeat, Congress could surely make the one subject to the other. But the question remains: where do we find a declaration of any such far-reaching purpose?

---

[14] In *Cities Service Gas Co.* v. *Peerless*, *supra*, at 340 U. S. 183, 95 L. Ed. 200, the Court pointed out that the Oklahoma

> "* * * Commission concluded that there was no competitive market for gas in the Guymon-Hugoton Field, that the integrated well and pipe-line owners were able to dictate the prices paid to producers without pipe-line outlets, and that as a result gas was being taken from the field at a price below its economic value. It further concluded that the taking of gas at the prevailing prices resulted in both economic and physical waste of gas * * *."

If long-line transmission pipe-lines by mere location and availability have that monopolistic power to drive down prices, what will their power be when, acquiring as a new and somewhat unusual ally, the Federal Power Commission, the two move jointly together to drive prices down further in the name of consumer public interest? What does Oklahoma do in the meantime? What happens to its landowner royalty owners, its oil companies, its banks, its public treasury?

The holding of a jurisdictional sale at the wellhead does more than prohibit, and thus invade, state regulation. It affirmatively imposed substantial obligations of the most awesome kind which, although appropriate to utility regulation and within the conceded constitutional power of Congress, could hardly have been anticipated by Congress for application to a person engaged in the local activity of drilling and bringing in an oil or gas well. Here, we see that we cannot brush this aside, as does the majority as mere pessimsitic hyphothetical prophesies.[15] Holding, as mere pessimistic hypothetical prophesies.[15] Holding, (*sic*) itself sets in train a whole series of requirements which makes it plain that when the wildcater spudded in, he may have thought himself a free enterpriser in the American tradition, but when the well comes in and the gas is sold to a person who sells it to another who sells it to a pipe line who transports it to a distributing company who sells it to a homeowner, he has become a public utility.

For the Court to say "no such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented" is to forget so soon what we struggled with a year ago in *Magnolia Petroleum Company* v. *Federal Power Commission*, 5 Cir., 236 F. 2d 785, cert. den. 352 U. S. 968, 1 L. Ed. 2d 322, and the related cases where the series 174, 174A,

---

[15] In *Deep South*, the Court says: "Petitioner argues, however, that what is involved here is 'more than merely regulation of sales,' for the reason that our decision herein will give rise to certain hypothetical situations predicated upon assumed future actions by the Commission, *viz.*, that should certificates of public convenience and necessity which petitioner will apply for be refused, Deep South must close its wells and suspend operations, and that petitioner must obtain the Commission's permission before discontinuing sales from a well which has been found subject to Federal jurisdiction. No such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented."

174B Order[16] cases were under review. Not here concerned with the validity of those regulations and accepting them for what they state, these regulations with their injunctive and criminal sanctions under Sections 20, 21(a), 15 USCA §717s, §717t(a), compel definitive action. They compel it now. Noncompliance subjects the independent producer to penalties now. Under Section 157.23(a) the Order requires an application for certificate of public convenience and necessity and, once obtained with service performed, Section 157.28 forbids abandonment of any sale or service without the express permission and approval of the Commission, *J. M. Huber Corporation* v. *Federal Power Commission*, 3 Cir., 236 F. 2d 550, cert. den. 352 U. S. 971, 1 L. Ed. 2d 324.

For an industry which has been built upon the inveterate, irrepressible, sometimes flamboyant, optimism of people anxious to take great risks to reap great rewards, suddenly to make out of it the staid and conservative business of a public utility, represents such a radical abandonment of the past that I cannot believe that Congress meant to do this to the thousands who annually bring, or try to bring, or hope to bring, in gas and oil wells. Especially is this so since the making of the very first sale which allows a molecule to make an interstate journey subjects that operator permanently to the jurisdiction of a remote agency until he can prove himself entitled to be freed. Even more so since those very same Orders prescribe that he cannot make any changes in the price which he is willing to sell his gas without first filing, as required under Section 154.92(a), a rate schedule and proving his right to it. And that very same Order, Section 154.94, as does the consistent administrative practice of the Commission, forbids either the use or application of automatic contract step-up

[16] See my dissent, *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785 at 793, especially Part I, page 797 through 808, which sets forth these regulations and describes their operation in detail.

rate escalation clauses. The operation of these Orders in the context of the Act under Section 4 and 5, 15 USCA 717c, 717d, exposes the operator to the possibility of an irretrievable loss by suspension for the maximum period of five months, *Humble Oil & Refining Company* v. *Federal Power Commission*, 5 Cir., 244 F. 2d 315 [7 cases]; *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 244 F. 2d 77. They subject the operator to the burden of proving as just and reasonable any proposed increase. And they expose him all the time to the likelihood that under Section 5 the Commission may determine that what he and his purchaser have agreed to, either in initial rates or those subsequently filed and approved, now produces an unjust and unreasonable rate which can no longer be collected.

I would think that when the Congress sets out radically to change a local free enterprise business[17] to that of a regulated utility, it would do so in unmistakable terms. I would think that it would not only say so, but prescribe as well adequate machinery[18] for the fulfillment of such an under-

---

[17] As of December 31, 1954, there were 511,200 producing wells. During 1954, in addition to 29,773 oil wells and 19,169 dry holes, 3,977 gas wells were brought in. Statistical Abstract of the United States 1956, page 741.

[18] To those of us dealing with these cases since the *Phillips* decision, the effort of the Commission and its overburdened staff to assimilate and handle the thousands of applications for certificates of public convenience and necessity, for rate increases, etc., can evoke only the most sympathetic appreciation for a problem for which it was not equipped by Congress. In October 1954 there were some 2,100 rate filings with 9,702 being received in January 1955.

Of more fundamental significance than the Congressional omission of the working tools (an adequate staff and budget) is the complete failure to prescribe the tools of substance, i. e., the standards to be applied for utility rate making in this field. The Commission immediately recognized this by its Order instituting Docket R-142 under the revealing Heading of "Consideration of principles and Methods to be Applied in the Fixing of Rates to be Charged by

taking. I would have thought that such a spectacular purpose would be soon evident and would not take eighteen years to discern.

Independent Producers for Natural Gas Sold in Interstate Commerce for Resale" which stated:

> "2. Necessary to a determination of the rates permitted by the Natural Gas Act to be made, demanded or received by a natural-gas company is the choice of methods to be used in determining the just and reasonable rate for any particular sale. The Commission, recognizing the basic differences between the operations of a producer and those of a pipe-line company, is desirous of securing any information, suggestions or proposals bearing upon the possible effect the several approaches might have upon the public interests towards which the Natural Gas Act is directed.
>
> "3. The Commission, therefore, is inviting the submission of suggestions as to the principles and methods to be applied by it in its regulation of the rates to be charged by independent producers for the transportation or sale of natural gas subject to the jurisdiction of the Commission. * * *
>
> "4. This is a matter of national importance and the Commission invites members of the industry, producers, gatherers, interstate pipe-line companies, distributors, consumers, groups and associations representative thereof, State commissions, municipalities, and any other interested persons to submit information, data, views, comments or suggestions in writing concerning the problem. * * *"

But the hearing could hardly supply what the statute omitted, so it was not surprising that after hearings in R-142 scheduled in December 1954 and held at various times in 1955, the Commission by order December 1, 1955, terminated R-142 with this significant finding:

> "* * * the information gained in this proceeding convinces us that, on the basis of the record herein, we should not lay down any rules as to what would be necessary or appropriate for consideration in determining the just and reasonable rates of any independent producer subject to our jurisdiction under the Natural Gas Act.
>
> "Accordingly, after full consideration of the suggestions, comments, and recommendations submitted, it appears to the Commission that adoption of any standards, principles, or methods respecting the matters and issues involved herein is not appropriate or necessary in carrying out the provisions of the Natural Gas Act. We so find."

In this analysis I have concentrated upon the searching out of Congressional intent. In that process, I think the so-called specific exemption of production and gathering is to be read as a part of §1(b) and not treated as though it stood alone. In that process, also, there are other aids advanced by the parties which point significantly in this direction.

At the outset it is significant that this is an "*in* interstate" commerce Act not one "*affecting*"[19] interstate commerce. The test then is not how much Congress covered, but rather how much of a field which it deliberately limited did it intend to cover. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 85 L. Ed. 881. The legislative history[20] indicates that the "in interstate" commerce

---

[19] Cf. for example other regulatory statutes passed prior to or contemporaneously with the Natural Gas Act: The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 USCA 201, 206), extended Federal regulation to conditions of employment "in the production of goods for commerce." The Bituminous Coal Act of 1937 (Act of April 26, 1937, 50 Stat. 72) applied Federal authority to matters directly "affecting" interstate commerce. The National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 USCA 141), imposed regulation upon matters "affecting" interstate commerce.

[20] One of Petitioner's briefs concisely traces this history:

As originally introduced, the bill which became the Natural Gas Act defined the scope of the Commission's jurisdiction in these words [H. R. 4008, 75th Cong., 1st sess. (1937)]:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of *such* natural gas for resale to the public, and to natural-gas companies engaged in such transportation or sale * * *" (emphasis supplied).

Similarly, §2(5) of the original version of the bill contained this definition of "natural-gas company":

> " 'Natural gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale of *such* gas for resale to the public" (emphasis supplied).

standard was articulately adopted to determine what "sales" were covered.

And since "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business," *Swift & Company* v. *United States,* 196 U. S. 375, 398, 49 L. Ed. 518, 525, and "We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical consideration," *United States* v. *Yellow Cab Company,* 332 U. S. 218, 231, 91 L. Ed. 2010, 2020, the test cannot be the simple one of the physical property of gas which keeps it in constant movement from the bottom of the well to the burner tip. " 'Practical continuity' does not always made an act a part of interstate commerce," *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 at 177, 83 L. Ed. 586 at 593. This is so since with casinghead gas the sales precede local processing which is essential to extract the valuable economic components of it and to prepare the gas for its interstate transmission and use as fuel. The processing itself is a local or intrastate activity and can hardly be

---

During hearings, objection was raised to the failure of the bill to "confine jurisdiction to gas sold in interstate commerce." [Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st sess., pp. 103-105 (1937)] The objecting witness, Mr. Russell G. Hunt, then offered the following amendment to §2(5):

> " 'Natural-gas company' means a person engaged in * * * the sale in interstate commerce of such gas for resale to the public."

Without material change, this amended definition, together with a corresponding change in §1(b), appeared in the bill as favorably reported out by the House Committee, [H. R. 6586 (1937) and H. Rept. No. 709, 75th Cong., 1st sess. (1937)] and in the same form in the Act as passed.

See also *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company,* 337 U. S. 498, 512, 513, footnote 16, 93 L. Ed. 1499 at 1509.

regarded as being "in" interstate commerce.[21] That the commodity almost certainly, or even inevitably, will be shipped out of the state does not make all of the activity interstate commerce even though it is done in the course of a part of that movement.[22]

In my approach to this matter, I treat these, and the contrary ones urged by the Commission,[23] as aids only. Dealing, as they do, with logs, iron ore, cotton, and the like, they hardly fit the fugitive expansive nature of gas. And, I do not attempt here to assert or explore their final, legal, decisive significance since they may be of "* * * that class of cases [in which] the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority," *Santa Cruz Fruit Packing Company* v. *NLRB*, 303 U. S. 453 at 466, 82 L. Ed. 954 at 960. But I do think they offer some relevant assistance in attempting to assay what Congress,

---

[21] See *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166; *Parker* v. *Brown*, 317 U. S. 341, 360-361, 87 L. Ed. 315, 331; *Federal Compress & Warehouse Company* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622; *Chassaniol* v. *Greenwood*, 291 U. S. 584, 78 L. Ed. 1004.

[22] See *Coe* v. *Errol*, 116 U. S. 517, 525, 29 L. Ed. 715, 718; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 74 L. Ed. 504; *Empresa Siderurgica S. A.* v. *County of Merced*, 337 U. S. 154, 157, 93 L. Ed. 1276, 1280; *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U. S. 62, 85 L. Ed. 1188; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 83 L. Ed. 580; *Atlantic Coast Line Railroad Co.* v. *Standard Oil Company*, 275 U. S. 257, 72 L. Ed. 271; *Oliver Mining Company* v. *Lord*, 262 U. S. 172, 67 L. Ed. 929; *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 76 L. Ed. 1038; *Arkadelphia Milling Company* v. *St. Louis S. W. R. Co.*, 249 U. S. 134, 63 L. Ed. 517; *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166; *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245, 259, 260, 67 L. Ed. 237, 243.

[23] See, e.g., *Shafer* v. *Farmers Grain Company*, 268 U. S. 189, 69 L. Ed. 909; *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 66 L. Ed. 458; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

familiar generally with legal concepts applied in this field throughout the years, could have had in mind.

But I do think we must recognize that, as in the situation which I analyzed in detail in which the state is deprived of the right to regulate the price of gas, current authoritative decisions also withdraw a substantial part of the gas business and the gas produced from the area of state taxation permitted in so many of these cases cited in notes 22 and 23, *supra*. In *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, the Court unanimously held that a Texas tax, applicable on gas at the outlet of an independent gasoline plant as it flows into the lines connecting with an interstate transmission system, violates the Commerce Clause. Of course, on the principle of *Panoma* to the extent that the jurisdictional sales go to the wellhead or beyond, the movement[24] effected by such sales is in interstate commerce and must likewise be removed from state taxation under *Calvert*. This means that at least to some extent tax cases are pertinent and in any event, this points up another consequence of a startling kind not shown to have been within Congressional contemplation.

These problems like the question of whether casinghead is "natural gas" and whether the sale is for "resale" or for a manufacturing process and later resale cannot be determined by artificial, mechanical standards, dictionary

---

[24] *Calvert* puts it in terms of movement, i.e., transportation

> "The problem in this case is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639, *supra*, but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. • • • " *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 at 166-167, 98 L. Ed. 583 at 592.

If the mechanical-physical movement test is decisive, it is difficult to see why the author and two Associate Justices would so soon dissent in *Phillips*.

definitions or, equally unauthoritative, judge-made definitions of some physical or scientific phenomenon.

The Act carefully limits it to the sales for resale of natural gas. It is uncontradicted that what is sold is *something* other than the fuel gas which ultimately goes into the transmission lines. Presumably the purchasers buy this casinghead gas for *all* of its constitutent elements. Indeed, in the case of Shell, the contract between it and Phillips began in 1938. It was not until July 1950 that any part of the residue gas sold by Phillips to El Paso Natural Gas. Until 1950 the residue gas was continuously flared. What did Phillips buy during these twelve years? What did Shell sell during these twelve years? What made it change merely because Phillips found a new use or outlet in 1950? Obviously Phillips bought casinghead gas for the valuable liquefiable hydrocarbons (natural gasoline, butane and propane). These are still a major constitutent of what they buy. The same is true in the other cases.

If the purchaser buys the gas for its *multiple* use, does not the producer sell for the same purposes. As to casinghead gas, the sale then is for (1) the extraction of valuable liquefiable hydrocarbons, (2) the removal of all valuable hydrocarbons, (3) the processing to eliminate impurities and (4) the sale of the residue to a pipe line company for resale. Now a sale for all four purposes is not a sale for one. And yet the Act itself defines the jurisdictional sale as "a sale in interstate commerce of natural gas for resale for ultimate public consumption" and then categorically states that the Act "shall not apply to *any other* * * * *sale* of natural gas."

Does not the very difficulty of attempting to define each of these operations as "processing" or "manufacturing" or analogize gas to a dead chicken, frozen or otherwise, *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49, 52, 54, 100 L. Ed. 917, 922-923, 924, and the uncontradicted fact that the sales had a substantial purpose other than ultimately making fuel gas available for transmission and delivery to consumers, suggest further

that sales "in interstate commerce for resale" was meant by Congress to be those effected after such processing was completed? Here, as nearly always, the literal[25] test cannot be applied. For "* * * even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words," *United States* v. *American Trucking Associations*, 310 U. S. 534 at 543, 84 L. Ed. 1345 at 1350.

I end as I began: could Congress have intended all of these things? Because I think not, I must respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

(SEAL)

---

[25] For example, the gasoline plant extracts the butane and propane from the natural casinghead gas. This is reduced to a liquid state under pressure and is distributed, as it now is widely, to communities not served by pipe lines. This very same propane, butane is then resold for "ultimate public consumption for domestic, commercial, industrial * * *" and other uses. Since, on the Commission's and Court's chemical-legal standards, it is still natural gas as the only change is from a gaseous to a liquid state, and there is no change in molecular structure, is the sale by the gasoline plant a sale of "natural gas for resale"? Is the sale by a statewide distributing company to local distributors such a sale? Likewise, suppose Shell sold the *oil* at the wellhead to a purchaser who in turn had sold the casinghead gas to Phillips, who had in turn sold the residue gas to El Paso. Is that original wellhead sale of the oil, carrying inevitably with it the casinghead gas from which all blessings and jurisdiction flow, a sale of natural gas? If not, why not? And if, as the Court holds, the Commission can establish the price which Texas Gas must pay to Deep South where Deep South's volume is but 5% of Texas Gas requirement and its output moves 95% intrastate and 5% interstate, why cannot the Commission fix the price for each barrel of this gas bearing, gas carrying oil?

Opinion in *Deep South Oil Company of Texas* v. *Federal Power Commission.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15849

DEEP SOUTH OIL COMPANY OF TEXAS,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

Petition for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(June 29, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: This case comes to us on the petition of Deep South Oil Company of Texas to review, pursuant to Section 19(b) of the Natural Gas Act,[1] order of the Federal Power Commission determining that Deep South is a "natural-gas company" as that term is defined in the Act.[2]

Deep South is a small, unintegrated corporation engaged in the exploration for and the production of oil and gas.

---

[1] 15 U. S. C. §717r(b).

[2] By Section 2(6) of the Natural Gas Act "natural-gas company" is defined to mean "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Its properties are located in the State of Texas, and its oil and gas facilities consist only of oil and gas well equipment, including flow lines, heaters and separators, together with such valves, tanks, and meters as are required for the operation of its wells and lines. As revealed by the record before us, Deep South owns or has an interest in and operates fourteen wells in the Big Hill Field located in Jefferson County, Texas. Five of these wells produce "casinghead gas"[3] and nine produce "full stream" or "gas well gas,"[4] and all of the gas from these wells which is not used in the field for drilling purposes by Deep South or other operators is sold to Texas Gas Corporation pursuant to a contract which was executed on February 15, 1952, for a term of twenty years. This agreement by its terms provides that the leases and lands which Deep South owns or acquires in the Big Hill area are "dedicated" to the performance of the contract, and that the gas shall be delivered at each of Deep South's wells located on the dedicated leases in a full stream, *in its natural state, without the extraction therefrom of any gasoline or other liquefiable hydrocarbons.*[5] Prior to delivery under the contract, the "casinghead gas" is separated from the oil with which it is produced at a field separator, and the "full stream gas" is treated for the removal of water at a so-called "free-water knockout." Within a few feet from the point at

---

[3] "Casinghead gas" is gas that is produced along with oil from an oil well and ordinarily consists of fixed gases, principally methane in bulk with other hydrocarbons ranging from the lighter ones down to the quite heavy ones. Mixed with those hydrocarbons are water vapor, acid gases, hydrogen sulphide and carbon dioxide, in addition to other fairly common diluents such as nitrogen, helium, and various sulphur compounds, and impurities such as drilling mud, rust, sand and dirt.

[4] "Full stream gas wells," "straight gas wells," and "gas distillate wells" are synonymous terms and the gas produced therefrom is "gas well gas," which contains fewer liquefiable hydrocarbons than gas produced in association with oil.

[5] All italics herein ours.

which the gas leaves the aforementioned mechanical devices, it passes into Texas Gas' meters which are located on the leases near the wellheads from which the gas is produced. There it is measured and delivered and title thereto passes to Texas Gas. Thereupon the gas then moves from these metering points through a network of converging pipelines of progressively larger size to the purchaser's processing plant at Winnie, Texas, which is located about seven miles from the Deep South leases. During the course of this movement, the gas purchased from Deep South is commingled in the pipelines with gas which Texas Gas has purchased from other operators in the area. At the Winnie processing plant all of the casinghead gas and gas well gas purchased by Texas Gas is processed for removal of water vapor and liquefiable hydrocarbons. After processing, the gas is discharged into a common sales header and pursuant to a contract between Texas Gas and Texas Eastern Transmission Corporation a portion of such gas flows into the latter's interstate transmission lines for transportation and resale in interstate commerce. This contract between Texas Gas and the pipeline company is for a minimum of fifteen years and by its terms the gas purchase contract between Deep South and Texas Gas and the gas which may be produced from the lands and leaseholds covered thereby are "dedicated" to the performance of the contract between Texas Gas and Texas Eastern.

The proceeding before the Commission which gave rise to this petition for review was initiated by Deep South when, in conformity with Rule 1.7(c) of the Commission's Rules of Practice and Procedure, it filed a petition for a declaratory order[6] in which it requested the Commission to

[6] In its amended and supplemental petition Deep South sought declaratory relief from the Commission with respect to a sale made from a single gas well in Refugio County, Texas. Subsequent to the hearing before the presiding examiner this well became exhausted, the equipment was dismantled and all deliveries of gas from the well discontinued. For that reason, Deep South withdrew

declare that petitioner's sales of natural gas to Texas Gas are not subject to regulation under the Natural Gas Act, 15 U. S. C. §§717-717w, and that petitioner is not a "natural-gas company" within the meaning of the Act or subject to the provisions of the Commission's Order No. 174-A.[7] This proceeding, Commission's Docket No. G-2952, was consolidated for the purposes of hearing with proceedings on two similar petitions filed by Shell Oil Company and Humble Oil & Refining Company, Commissioner's Docket Nos. G-4671 and G-5261, respectively. After a hearing and upon the facts of record, the presiding examiner decided that petitioners' sales of gas, and each of them, were sales in interstate commerce of natural gas for resale within the purview of the Natural Gas Act, and that by reasons of such sales, each of the petitioners was a "natural-gas company" subject to regulation under the provisions of the Act. Accordingly, petitioners' respective prayers for declaratory relief were denied.

Deep South, Shell, and Humble Oil thereupon filed exceptions to the decision of the presiding examiner and the Commission, after hearing oral argument thereon, issued on September 9, 1955, its Opinion No. 284 and accompanying order affirming the decision of the examiner for the reasons therein stated. In its opinion the Commission noticed the fact that these consolidated proceedings presented to it for the first time the question whether sales of natural gas made before the completion of "production and gathering" are exempt from the Natural Gas Act by

---

its request for relief with respect to this well, the withdrawal being made at the time of the argument before the Commission. The Commission's opinion and order contain references to this well, but the questions relating to it are now moot and are not referred to in Deep South's petition for review or discussed in its brief.

[7] See *Magnolia Petroleum Company* v. *Federal Power Commission*, 5 Cir., 236 F. 2d 785, cert. denied 352 U. S. 968, for a discussion of Order No. 174-A.

reason of the exclusionary provision of Section 1(b) of the Act. In resolving this question the Commission rejected petitioners' claims that "casinghead gas" is not "natural gas" within the meaning of the Act, and expressly affirmed the examiner's conclusion that there is nothing in the Natural Gas Act which supports petitioners' assertion that regulation under the Act is confined to fuel gas which consists "almost entirely of methane and ethane." Likewise, the Commission concluded that there was no merit in the contention that the sales in question are for "manufacture" and not for "resale." And, on the basis of its finding that the entire movement of the gas from the producing wells through the processing plants to consumers in other states is an uninterrupted and continuous flow, the Commission determined that the gas which is sold by petitioners is sold "in interstate commerce." Finally, the Commission concluded that none of the sales is exempt from regulation under the Act for the reason that the exemptive language of Section 1(b) does not nullify the clear and specific grant of jurisdiction over "sales of natural gas in interstate commerce for resale." Thereafter and agreeable to the provisions of Section 19(a) of the Act, petitioners filed applications for rehearing of this order, which applications were on November 4, 1955, denied by order of the Commission. Whereupon, Deep South, Shell and Humble Oil, each filed a petition for review,[8] praying that the orders of September 9 and November 4, 1955, be set aside in their entirety and that this Court further determine and declare that petitioner is not a "natural-gas company" within the meaning of the Act and that its sales are not subject to the jurisdiction of the Commission.

---

[8] Shell Oil Company's petition for review has been docketed as cause No. 15,900 and Humble Oil & Refining Company's petition has been docketed as cause No. 15,884. The three cases were consolidated for purposes of argument and submission by order of Court entered June 25, 1956, however, separate opinions and judgments will be filed and entered in each case.

In this review proceeding as in the proceeding which was had before the Commission, Deep South raises two issues. The first and principal point urged is that the sales made by it are not within the specific affirmative grant of jurisdiction to the Commission over sales "in" interstate commerce, for the reason that all of the relevant circumstances establish that they are "local" in character. We do not agree. In our opinion the statutory language, its legislative history and prior decisions of the Supreme Court compel a contrary conclusion. When the Act was passed in 1938, Congress declared the national policy in doing so as follows:

> "SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

In the hearings which were had before the House Committee on Interstate and Foreign Commerce prior to the adoption of the Act, Congress was fully informed as to the need for such regulation and among other considerations it was cognizant of the fact that the prices at which local distributing companies can sell gas are in very large part determined by the prices they are required to pay for the same to interstate pipeline companies. It was strongly urged to Congress that the public cannot be protected from exploitation in the prices charged for natural gas unless Government shall control not only the price charged by the

companies which deliver the gas to the consumer, but also the prices of all companies which cooperate in bringing the gas from the wells in the state of production to the ultimate consumer in the state of distribution.[9] The Committee reports on the bill which became the Natural Gas Act specifically stated that "sales for resale, or so-called wholesale sales in interstate commerce *(for example, sales by producing companies to distributing companies)* . . . have been considered [by the courts] to be *not local in character,* and even in the absence of Congressional action not subject to State regulation."[10] Accordingly, Congress provided in Section 1(b) of the Act the following:

> "*The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale,* but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

"Natural gas" is defined in Section 2(5) of the Act to mean "either natural gas unmixed, or any mixture of natural or artificial gas," and in Section 2(7) "interstate commerce" is defined as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

In numerous decisions, the Supreme Court has recognized that the Act was primarily designed to protect

---

[9] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. p. 142.

[10] H. R. Rep. No. 709, 75th Cong., 1st Sess., 1-2; S. Rep. No. 1162, 75th Cong., 1st Sess., 1-2.

consumer interests against exploitation at the hands of private natural gas companies, and with particular reference to sales by independent producers the Court, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 682, said:

> ". . . we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

And in emphasizing the purpose of the Natural Gas Act to protect consumers, the Court at page 685 observed that:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from the regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co., supra*, at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language."

Having in mind the obvious purpose of Congress which was to see that there was effective regulation of all interstate wholesale sales of natural gas, it would be an exceedingly

incongruous result if a statute so motivated and planned to bring about such regulation were construed so as to obtain the opposite result. To hold, as petitioner would have us do, that it may set up its own interests in complete freedom from regulation of the price of its wholesale sales would be to permit it, if it were so inclined, to engage in the very exploitation which the Act was designed to prevent. We cannot therefore subscribe to the view that the Act contemplates that petitioner or any other independent producer should be free of price regulation, if it is engaged in the sale in interstate commerce of natural gas for resale.

As to petitioner's claim that its sales are "local" in character, we think it plain that they are sales "in interstate commerce" for the obvious reason that the sale of gas originating in one state and its transmission and delivery to distributors in any other state constitutes interstate commerce. *Federal Power Commission* v. *Natural Gas Pipeline Company of America*, 315 U. S. 575, 582. *Cf. Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 467. The fact that the sales are made at the wellhead is immaterial for the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business. *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 503-504. Here, petitioner's own brief testifies eloquently to the continuous movement of the gas which it sells at the wellhead. Petitioner admits, as, of course, it must, "that there is a continuous flow of gas from the Deep South wells into the gathering system of Texas Gas; that the mass of gas of which the Deep South gas becomes a part moves continuously through the gathering system into a processing plant; that the movement through the processing plant is continuous; that there is a continuous movement of natural gas from the outlet of the processing plant to both interstate and intrastate destinations. . . ." Accord-

ingly, and in the light of all of the uncontroverted facts, we hold that when the gas was sold by petitioner it had commenced its journey in interstate commerce.

We are likewise no more impressed than was the Commission with the claim that petitioner's sales were made for "manufacture", not for "resale." This contention is made notwithstanding the fact that all of the parties to the contract between Deep South and Texas Gas fully understood that the gas was to be resold in wholesale quantities by the buyer. In the conduct of its business, petitioner sells its gas in bulk to Texas Gas. Texas Gas in turn and at the tailgate of its processing plant resells the gas which it purchases from the petitioner to an interstate transmission company for resale, as well as to intrastate customers. The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act. Nor is it of significance that the gas in the course of its interstate transmission passes through Texas Gas' processing plant. The processing herein involved is not an interruption of the interstate journey and is not "manufacture." On the contrary, as noted above, the processing does not interrupt the continuous movement of the gas from the wellhead to consumer burner tips and is merely a part of the business of transporting and marketing gas in interstate commerce. *City of Detroit* v. *Federal Power Commission,* D. C. Cir., 230 F. 2d 810, 820, cert. denied 352 U. S. 829. *Cf. Cities Service Gas Co.* v. *Federal Power Commission,* 10 Cir., 155 F. 2d 694, cert. denied 329 U. S. 773.

Petitioner also insists that the casinghead gas which it sells is not "natural gas" within the meaning of the Act. For answer we deem it sufficient to say that there is nothing in the general language used in the definition of "natural gas," quoted above, which suggests that a

special or narrow or unnatural definition of "natural" was meant. Boone's Petroleum Dictionary (1952) defines natural gas as *a mixture of gaseous hydrocarbons found in nature* in many places connected with deposits of petroleum, to which the gaseous compounds are closely related. The record in this case shows that the principal constituents of natural gas which is used as a domestic or industrial fuel are methane and ethane; that casinghead gas contains methane and ethane, as well as other constituents that are valuable, such as propane, butane, and the heavier components that comprise natural gasoline; and that it is economically desirable to remove these additional components for their value. The gas sold by petitioner contains the methane and ethane which constitutes the bulk of fuel gas distributed to domestic, commercial and industrial consumers. And the extraction process to which the gas is subjected after delivery under the sales contract does not create or add to the product any amount of either of those components. Thus, it is plain that casinghead gas is not any the less "natural" gas because it contains variable amounts of other constituents.

The petitioner alternatively contends, however, that regardless of whether the sales in question are sales in interstate commerce, the transactions fall within the clause of Section 1(b) of the Act which specifically excepts from the Commission's jurisdiction the regulation of ". . . the production or gathering of natural gas." We do not at all agree, but on the contrary think that our observations in *Interstate Natural Gas Company* v. *Federal Power Commission*, 156 F. 2d 949, 951, supply a ready answer to this contention. There, in speaking of Section 1(b), we said:

> "[The Act] is very simply and plainly written. After stating what it shall apply to, it then states what it shall not apply to. Under familiar rules of construction a negation in or exception to a statute will be construed so as to avoid nullifying

> or restricting its apparent principal purpose and the positive provisions made to carry them out. . . . Here the statute was drawn to regulate, it picked out for inclusion 'sale in interstate commerce of natural gas for resale for ultimate public consumption.' . . . Unnecessarily perhaps but in the interest of making clear that the act gave jurisdiction only over sales and transportation of the kind described in it, it used language removing from any doubt that the Commission was not to have jurisdiction over properties used for production and local distribution or the activities of production and gathering. It did this by expressly providing that the act should not apply 'to the facilities used for such [i.e. local] distribution or to the production or gathering of Natural gas.' "

The exemption of production and gathering merely means that the physical activities, facilities and properties used by petitioner in the production and gathering of natural gas are not within the Commission's power of regulation. However, there is nothing in the Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in interstate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate.

Petitioner argues, however, that what is involved here is "more than merely regulation of sales," for the reason that our decision herein will give rise to certain hypothetical situations predicated upon assumed future actions by the Commission, viz., that should certificates of public convenience and necessity which petitioner will apply for be refused, Deep South must close its wells and suspend

operations, and that petitioner must obtain the Commission's permission before discontinuing sales from a well which has been found subject to Federal jurisdiction. No such issues are presented in the instant case, and it will be time enough to pass upon those issues if and when they are properly presented.

In the light of the foregoing it follows that the order of the Commission declaring Deep South Oil Company of Texas to be a "natural-gas company" within the meaning of the Natural Gas Act should be and the same hereby is affirmed.

AFFIRMED.

BROWN, Circuit Judge: I dissent for reasons hereafter to be filed.

IN THE

Supreme Court of the United States

October Term, 1957

No. 449

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

ADDENDUM TO PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing herein on September 11, 1957 of the Petition for a Writ of Certiorari, Petitioner received the following letter from the Clerk of the United States Court of Appeals for the Fifth Circuit, which is hereby added as an Addendum to the Appendix to the Petition filed herein:

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleans 6, La.

September 13, 1957

Gentlemen:

The Court has today corrected its opinion rendered on June 29, 1957 in re:

No. 15900. Shell Oil Company vs. Federal Power Commission.,

as follows:

On page 5, Line 9—delete all words except the first three, "by it and"; Line 10 through 15—delete all lines; Line 16— delete the words "phasis supplied.)"; and change the capital "T" in the word "Thus" to lower case.

As corrected, the last sentence of the next to last paragraph should read: "The record here clearly shows that the gas sold to Phillips is resold by it and thus, as in *Deep South*, there can be no question that petitioner is making sales in interstate commerce of natural gas for resale within the meaning of the Act."

Very truly yours,

(Sgd.) EDWARD E. WADSWORTH
EDWARD W. WADSWORTH
Clerk

The portion of the opinion to which the foregoing changes refer appears at lines 25-32, page 21, of the Petition for Writ of Certiorari filed herein.

Petitioner prays that this Addendum be filed as part of the Petition filed herein by it on September 11, 1957.

Respectfully submitted,

Attorney for Petitioner.

Certificate of Service

I certify that the foregoing Addendum to Petition for a Writ of Certiorari was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 25th day of September, 1957:

J. Lee Rankin, Solicitor General
Department of Justice
Washington 25, D. C.

Willard W. Gatchell, General Counsel
Robert L. Russell, Attorney
William L. Ellis, Attorney
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

William J. Barney
Attorney for Petitioner.

New York, New York,
September 25, 1957.